Petition

81-1957

Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

TOMAS REYES PEÑA,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

P E T I T I O N

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE PROSECUTION INCURRED IN MISCONDUCT WHEN IT FAILED TO DISCLOSE TO DEFENDANT EXCULPATORY EVIDENCE AS REQUIRED BY BRADY VS. MARYLAND.

2. WHETHER DEFENDANT'S RIGHT TO A DUE PROCESS OF LAW WAS VIOLATED WHEN HIS MOTION FOR SEVERANCE BASED ON ANTAGONISTIC DEFENSES WAS DENIED.

3. WHETHER DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL WAS VIOLATED WHEN HIS MOTION FOR A SEPARATE TRIAL FOR COUNT THREE WAS DENIED.

4. WHETHER VOICE RECORDINGS AND VIDEOTAPES WHICH PRESENT INFLAMMATORY AND PREJUDICIAL MATTER UNRELATED TO THE INDICTMENT MAY BE ADMITTED AGAINST A DEFENDANT JUST TO DEFEAT A POSSIBLE DEFENSE FROM ANOTHER CO-DEFENDANT.

5. WHETHER THE PETITIONER WAS DENIED ADEQUATE REPRESENTATION OF COUNSEL

AS REQUIRED BY THE SIXTH AMENDMENT, WHEN HIS ATTORNEY FAILED TO PROPERLY INVESTIGATE AND PREPARE FOR TRIAL.

6. WHETHER THE UNCORROBORATED TESTIMONY OF AN EXCESSIVELY PAID INFORMANT IS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS AS TO COUNTS ONE AND TWO.

7. WHETHER PETITIONER'S SENTENCE WAS ARBITRARY, EXCESSIVE AND DISPARATE AND CONTRAVENES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT OF THE EIGHTH AMENDMENT AND THE FIFTH AMENDMENT GUARANTEE AGAINST DOUBLE JEOPARDY.

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OPINION BELOW

The opinion of the U. S. Court of Appeals for the First Circuit appears at 668 F 2d 625 (1 Cir, 1982) and is reproduced in the Appendix at pp 1-11.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1982 (App. 12). The petition for rehearing was denied on February 19, 1982. (App. 13). The order denying Petitioners motion to stay mandate and remand was denied on February 26, 1982 (App. 14). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

21 USC §841. Prohibited acts A-Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

18 USC §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner Tomás Reyes-Peña was tried, together with another co-defendant, on a multiple count indictment which charged that petitioner herein and José Antonio Martínez,

in count one, and Ramón Elí Barreto, in counts two and three, aided and abetted each other in possessing and distributing cocaine in violation of 21 USC 841 (a)(1) and 18 USC 2. The petitioner was charged and convicted only in counts one and two.

The day the trial was scheduled to start, the Assistant U.S. Attorney in charge of the case advised attorneys for José Antonio Martínez (Tony) that the Government was going to request dismissal without prejudice of the case against Tony. The defense objected and with the jury panel present the attorneys approached the bench and the prosecutor informed the Court that he lacked sufficient evidence and wanted to dismiss with prejudice the indictment against José Antonio Martínez. The Prosecutor was advised by one of Mr. Martínez' attorneys that he had an alibi defense and the prosecutor failed to convey

this information to the attorney for Petitioner.

The Court granted the Government's request and the case against José Antonio Martínez (Tony) was dismissed with prejudice as to the only count he was charged - Count ONE. Petitioner was the only person who remained accused in said count.

Both during opening and closing argument the Government made reference to Tony as being the person whom Reyes Peña aided and abetted as to Count ONE. But more important, the informant whose uncorroborated testimony served as the only evidence in that Count, on several occasions also stated that "Tony" had been with Tomás Reyes Peña at her apartment on the 28th of July and that he said that he had tried the cocaine and it was good. On cross examination by counsel she reiterated that testimony. As already stated, the only evidence presented under Count One was the

uncorroborated testimony of a paid informant. The alleged occurrences do not appear in any recording or videotape equipment although such equipment was in place and ready to be used.

With regard to Count Two, co-defendant Barreto had filed a motion for severance prior to trial on the basis of contradictory, antagonistic defenses. On the first day of trial, the attorney for Petitioner raised a motion to sever the trial of the defendants. He argued that the defenses that defendant Barreto was going to raise were going to be prejudicial to his client.

The prejudice to Petitioner was not delayed. The cross-examination of co-defendants counsel to the informant was more damaging to Petitioner because of the repetitive factor and because it came from the defense camp rather than the direct.

On the cross-examination of a witness the attorney for Barreto also elicited

prejudicial comments against Petitioner. However, the more severe blows to Petitioner were dealt by co-defendant's attorney in his closing argument. On two occasions he was cautioned by the Judge but the damage was done, he had placed full responsibility for any wrong doing on Petitioner. Counsel for Reyes Peña on the second occasion requested mistrial and it was denied.

The court also allowed the case to proceed with Count Three. Petitioner was not charged in Count three and the evidence presented in that count had a prejudicial spill-over effect against him that could not be cured by any instruction.

The informant testified about a package full of cocaine in possession of Barreto, also there was videotape presentation of Barreto weighing that cocaine on the scale on July 31, 1979; there is the testimony of Barreto going out to distribute said cocaine. And then, there is testimony as to

Barreto taking two hits of heroin, all that evidence came before the jury due to the joinder of trials and defendants with antagonistic defenses.

The tapes also contained a statement from Barreto where he admits that his job is to be a drug trafficker, that is the only thing he knows how to do.

After the guilty verdicts, the Court ordered a pre-sentence report and after it was submitted, sentencing was set for July 11, 1980.

The Court initially sentenced the Petitioner herein to imprisonment for a period of fifteen years in Count One and for fifteen years in Count Two, to be served consecutively. A special parole term of three years was imposed in each count, to run concurrently. On reconsideration, the District Court modified the sentence to imprinsonment for a period of seven years in Count One

and for a period of fifteen years in Count Two, both sentences to run consecutively. A special parole term of three years was imposed in Count One and of five years in Count Two; to run concurrently.

The petitioner herein on a petition in the nature of a Habeas Corpus requested his sentence to be vacated due to ineffective assistance of counsel. The District Court expressed to the Appellant that in view of his pending appeal the issue of effective representation should be raised therein.

Petitioner's counsel at trial admitted possession of cocaine by Petitioner on his summation to the jury. Throughout the proceedings that led to petitioner's conviction, his counsel failed to interview witnesses and raise a number of defenses and objections and to adequately prepare for trial.

A R G U M E N T

1. WHETHER THE PROSECUTION INCURRED IN MISCONDUCT WHEN IT FAILED TO DISCLOSE TO DEFENDANT EXCULPATORY EVIDENCE AS REQUIRED BY BRADY VS. MARYLAND.

The prosecution suppressed evidence favorable to the defendant. When the prosecutor was informed that Tony Martínez had an alibi defense he was under the obligation to so inform the other defendants. The suppression by the prosecutor of this evidence favorable to the defendant was a violation of due process. Brady v. Maryland, 373 US 83, 87 (1963); United States v. Di Carlo, 575 F 2d 952, 958 (1978).

The District Court indicated that the evidence as to count one was not very strong, and more so when it relied solely on the testimony of the paid informant. If to this picture we add that there is nothing in the videotape or the tape recording as

to the transaction on July 28, 1980 the evidence that Tony was not present would have been clearly exculpatory of Tomás Reyes Peña. If Tony was not there with Tomás to say he had tried the cocaine and it was good, then the informant was lying. There is no doubt that the omission was material. United States v. Agurs, 427 US 97 (1976).

In addition to count one, the presentation of evidence controverting so substantially the testimony of the informant would undoubtedly affect her credibility as to count two. The informant is in very many basic respects also uncorroborated by the videotape or the recordings. If her credibility is chattered by the evidence suppressed by the prosecutor, it necessarily follows that said evidence would have created a reasonable doubt that did not exist or that together with other elements of uncorroboration would lead to reasonable doubt in the mind of the jury. The voluntary

and illegal suppression of this evidence by the government amounted to constitutional error. See Agurs, 427 US at 112-113.

The Court of Appeals, 668 F 2d at 625, Appendix 9, states that the "US Attorney" was under no duty to investigate it." However, the requirement is for the goverment to disclose evidence favorable to defendant, not to investigate: the criteria may not be limited to what a prosecutor is willing to believe or to investigate.

2. WHETHER DEFENDANT'S RIGHT TO A DUE PROCESS OF LAW WAS VIOLATED WHEN HIS MOTION FOR SEVERANCE BASED ON ANTAGONISTIC DEFENSES WAS DENIED.

The trial court committed reversible error when it forced Tomás Reyes Peña to enter into a trial with Ramón Barreto (Pipo). The Court was fully appraised of the nature and extent of the conflict between the defenses of both co-defendants. This was done by motion prior to trial and on the

first day of trial. The Court decided to allow the case to come before the jury, even with the acceptance from the prosecutor: "That there might be sufficient prejudice that the Court could grant the severance under Rule 14."

The Petitioner respectfully submits that defendants were improperly joined in count two because there was no possibility that the defenses announced by co-defendant Barreto would not be prejudicial to the petitioner. This misjoinder was prejudicial as has been shown in the statement of the case. The Court of Appeals has held that a misjoinder of this nature is prejudicial per se, King v. United States, 355 F 2d 700 (1 Cir, 1966); United States v. Turkette, 632 F 2d 896, 906, N. 35 (1 Cir, 1980); Mc Elroy v. United States, 164 US 76 (1896).

The motion to severe requested by Reyes Peña's attorney and denied by the Court should have been granted under Rule 14, Fed

R. Crm. P., the failure to do so was error that merits reversal of the conviction.

Rule 8b, Fed. R. Crim. P. sets the limits of tolerance beyond which the danger of prejudice outweighs the benefit, that any joinder which does not fall within the rule is per se impermissible, Turkette, 632 F 2d at 906. The joinder of defendants in the same indictment where count three is charged only against co-defendant Barreto falls without Rule 8(b). As to count three there is no doubt that the evidence had to be directed only against Barreto because said count was not the same act or transaction as the ones imputed in counts one and two. The District Court erred when it allowed this improper joinder and when it refused to sever.

The petitioner was improperly prejudiced by the spill-over of prejudicial evidence presented as to co-defendant Barreto. This is sufficient to merit reversal. Guilt is

both individual and personal. Kotteakos v. United States, 328 US 750, 773 (1946).

3. WHETHER DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL WAS VIOLATED WHEN HIS MOTION FOR A SEPARATE TRIAL FOR COUNT THREE WAS DENIED.

The Trial Court committed plain error when it failed to follow Rule 8(b). See Argument in question 2.

The Court failed to order a separate trial for Count Three.*/ The prosecutor took improper advantage of the improper joinder. The intention of the government was clear: the evidence as to corroboration of the informant was weak as to counts one and two with relation to Reyes Peña, so they went for the "guilt by association" gambit. This is clear from the Prosecutor opening statement: (Tr. 34).

> And this quantity of cocaine is a sample of two ounces of cocaine which

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*/ Reyes Peña was not charged in Count Three.

> Tomás Reyes Peña was going to sell for sixteen hundred dollars an ounce or thirty-two hundred dollars an ounce.
>
> And what happened to those two ounces? They were, in fact sold. When? On July 31st, 1979. On July 31st, 1979, Tomás Reyes Peña and Ramón Elí Barreto Talavera, defendant here on trial, along with a woman by the name of Lucero, not here on trial, went to the apartment of the paid informant of the Drug Enforcement Administration.
>
> They entered that apartment with two ounces of cocaine on the one hand, and an eighth of a kilo of cocaine in the other.
>
> When they entered the apartment, Tomás Reyes Peña took the two ounces and put them on the scale that was there already and weighed the two ounces.
>
> Mr. Ramón Talavera removed the same two ounces which they came in with and started weighing his own cocaine, also an eighth of a kilo of cocaine.

The improper joinder of Count Three was prejudicial to Reyes Peña. It was improper under Rule 8(b), Fed. R. Crim. P. The attorney for Tomás Reyes Peña failed to request severance under Rule 14 until the first day of trial; the Trial Court failed to grant severance. If the Court finds that

the request was untimely then appellant was severely prejudiced by his attorney's failure to move the court on time. But, even if the matter was brought to the attention of the District Court on the first day of trial, the District Court on its own motion should have ordered a severance before that day. Its failure to do so was plain error.

The joinder of count three was error for it was not part of a "series" of acts resulting from a common set of facts. All elements of proof as to Count Three were distinct and separate from elements of proof as to counts one and two.

The Court of Appeals has clearly stated that joinder of offenses because substantially they are the same kind of transactions is impermissible under Rule 8(b). King v. United States, 355 F 2d 700, 703 (1 Cir. 1966). The reasoning followed by the Court affirming the District Court fails to follow McElroy v. United States, 164 US 76

(1896).

4. WHETHER VOICE RECORDINGS AND VIDEOTAPES WHICH PRESENT INFLAMATORY AND PREJUDICIAL MATTER UNRELATED TO THE INDICTMENT MAY BE ADMITTED AGAINST A DEFENDANT JUST TO DEFEAT A POSSIBLE DEFENSE FROM ANOTHER CO-DEFENDANT.

The record shows that petitioner was gravely prejudiced by the videotape and recording presented in evidence without any objection from his attorney.

The videotape contains frames where co-defendant Barreto is weighing cocaine not charged to Reyes Peña; where Reyes Peña is counting money not related to any of the charges in the indictment; where Barreto is shown snorting heroine not charged even to him these were inflammatory and should have been suppressed under Rule 403, Fed. R. Evidence. The audio recording was repleted with drug conversations unrelated to charges in the indictment; comments made as to past

experiences some of which related to Reyes Peña's convictions for which he had served time; there were conversations of a political nature that were prejudicial to the defendants; there were other statements of a personal nature that placed the defendants in a very unfavorable light as to their personal lives.

None of the aforementioned elements was necessary to prove the matter sought to be proved; the government had no factual need for that evidence. In the balancing of interests so necessary, the Court should have excluded all that evidence, the failure to do so is reversible error. United States v. Goodwin, 492 F 2d 1141, 1150 (5 Cir, 1974); United States v. Cook, 538 F 2d 1000 (3 Cir, 1976). */

The rule in the First Circuit is the same: United States v. Eatherton, 519 F 2d

*/ See; Notes of Advisory Committee on Rule 401, Fed R. of Evidence.

603, 611 (1 Cir, 1975). The trial court is required to do a balancing of the prejudicial potential of the evidence against its probative value. In the instant case all the aforementioned prejudicial evidence had no probative value. The government was trying to create prejudice: If Reyes Peña would talk like this; if he walks around with persons who take heroin, he must be guilty. This violates Reyes Peña's right to a due process.*/ This practice by the prosecution was rejected by the Circuit in United States v. Fortes, 619 F 2d 108, 121 (1 Cir, 1980); citing United States v. Fosher, 568 F 2d 207 (1 Cir, 1978). The Circuit failed to follow its own rule.

The attorney for Reyes Peña failed to

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*/ Saltzburg & Redden, Federal Rules of Evidence Mannual 3 Ed p.103"Of course, if exclusion of evidence is absolutely necessary to insure a fair trial, the due process clause of the Fifth Amendment would govern".

prior to trial or at trial, to move for the suppression of this evidence; or to limit its presentation; or to request curative instructions, or to object the presentation into evidence of the video-tape or audio recordings. -This amounted to ineffective or inadequate assistance of counsel. The District Court failed to protect the defendant -This was plain error.

The verdicts against petitioner were the result of unfair prejudice*/, they must be reversed.

The Circuit Court's opinion upholding the District Court is in opposition to Michelson v. United States, 335 US 469, 475-476, the petitioner was prejudiced for the unnecessary evidence presented "overpersuaded them as to prejudice one with

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*/ The Notes of the Advisory Committee, Rule 403, Fed. R. of Evidence, define "Unfair Prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

a bad general record and deny him a fair charge."

5. WHETHER THE PETITIONER WAS DENIED ADEQUATE REPRESENTATION OF COUNSEL AS REQUIRED BY THE SIXTH AMENDMENT, WHEN HIS ATTORNEY FAILED TO PROPERLY INVESTIGATE AND PREPARE FOR TRIAL.

The Sixth Amendment to the United States Constitution clearly sets the right of the accused to have the assistance of counsel for his defense in criminal prosecutions. Courts have long recognized that the right to counsel is the right to the effective assistance of counsel. United States v. Bosch, 584 F 2d 1113 (1st Cir, 1978) quoting from McMann v. Richardson, 397 U.S. 759, 771 N. 14 (1970).

In the case at bar, the appellant did not receive the "reasonably competent assistance" required for his criminal prosecution to meet the Sixth Amendment right to counsel as that right has been

interpreted by this Honorable Court. As stated in the Statements of the case in this Petition, counsel for petitioner:

1. failed to file any discovery motion;

2. failed to request suppression of videotapes;

3. failed to request suppression of recording;

4. failed to request a severance prior to commencement of trial;

5. failed to make a motion in limine as to inflammatory testimony by witnesses;

6. failed to meet with attorneys for other co-defendants and request information as to José Antonio Martínez' dismissal;

7. failed to request prior testimony at other trials by the informant;

8. failed to object inadmissible evidence;

9. failed to object to improper testimony;

10. failed to request appropriate instructions to the jury;

11. failed to object to charges given by the Court to the jury;

12. failed to bring before the jury the defense of alibi, known to José Antonio Martínez (Tony) as to Count One;

13. failed to bring before the jury a defense of entrapment by the informant as to Count Two;

14. failed to move for mistrial after evidence from the Government showed inflammatory statements and videotapes;

15. improperly admitted possession of cocaine by Reyes Peña on his summation to the jury.

The trial counsel's legal representation of petitioner in this case amounts to the "negligent or ignorant" performance regarded as sufficient by the Courts to find a Sixth Amendment violation. In the Bosch case, supra, for instance, the First Circuit

found that defense counsel's submission into evidence of a pre-trial motion for reduction of bail which contained references to defendant's past crimes bore no relation to the implementation of a defense strategy. That Court further found that such related convictions could only cause a significant harm to defendant's case and that trial counsel's offer of those references into evidence clearly resulted from neglect or ignorance in deprivation of defendant's Sixth Amendment right to effective counsel. A similar situation is present in the instant case where the trial counsel improperly admitted possession of cocaine by the petitioner on his summation to the jury. Such an admission is, at best, a senseless disregard for the client's rights which caused a significant harm to the case. Bosch, 584 F 2d at 1122.

The position taken by the Court of

Appeals in the present action is contrary to its own rule and to the interpretation of the duty owed to a defendant by his attorney established by the Court of Appeals for the Fifth Circuit.

The case of Rummel v. Estelle, 590 F 2d 103 (5th Cir, 1979) is also on point. In that case, the Fifth Circuit, recognizing that investigation and preparation are the keys to effective representation, ruled that counsel have a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings and laws involved. Id. 590 F. 2d 104 (citations omitted).

The record in the present case reflects a consistent failure by the trial counsel to fully familiarize himself with the facts and circumstances surrounding the case. An example of this is his failure to meet with the attorneys for other co-defendant and to request information

as to the dismissal of the case against co-defendant José Antonio Martínez. By not meeting with the co-defendant's attorneys and by not investigating the circumstances leading to the dismissal against a co-defendant, the trial counsel failed to obtain essential information dealing with the defense of alibi. He also failed to investigate prior testimony by the informant at other trials.*/

In Cuyler v. Sullivan, 446 U.S. 335 (1980), it was recently held that a defendant who retains his own counsel is entitled to the same protection as a defendant whose counsel is appointed by the Court. In the words of the Court:

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*/ During trial the attorney for the petitioner requests to interrupt his cross-examination of informant in order to view the video tape, to corroborate "very important" matter, he explained that he had only seen the tape once, "and then in a haste and with many people".

> The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.- Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. 446 U.S. at 344, 345.

It is therefore clear that on the trial record in this case, as well as under the case law that should be followed by the Court of Appeals, Petitioner Reyes Peña's right to adequate legal representation was violated.

6. WHETHER THE UNCORROBORATED TESTIMONY OF AN EXCESSIVELY PAID INFORMANT IS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS AS TO COUNTS ONE AND TWO.

Petitioner Reyes Peña was charged in both counts, one and two, with aiding and

abetting. The inquiry as to whether the Trial Court erred or not in denying motions to acquit under Rule 29, Fed. R. Crim. P., must turn upon a consideration of the elements of said offense, in order to ascertain if the government established them beyond a reasonable doubt. United States v. Tarr, 589 F 2d 55, 59-60 (1st Cir. 1978).

The government must show not only that Petitioner Reyes Peña committed a crime, but also must show he shared with someone the specific intent of making the criminal scheme succeed, in this case he must have agreed to and share the principal's criminal intent to possess with intent to distribute and did distribute, as to Count ONe, .2 grams of cocaine and, as to Count two, 54.2 grams (2 ounces) of cocaine, "there must be a community of unlawful purpose at the time the act is committed." Snyder v. United States, 448 F 2d 716, 718 (8th Cir. 1971). The Government case falls in both counts for it

failed to show any "community of unlawful purpose"or any "common design" between Reyes Peña and any principal, or as a matter of fact with any other person.

The testimony of the informant is the foundation of the government's case, as to both counts, against Petitioner. There is no doubt that she was a government agent, but also a paid informant who was receiving $210 per week, plus free rent, utilities and traveling expenses as long as she was giving information and who admitted that her benefits depended on the amount of cases she brought to court. She also received a $20,000 reward. She had an economic interest in providing information and was in effect working under a contingency fee arrangement with the government.

The aforementioned considerations are of much importance because the uncorroborated testimony of a paid informant who has received such large amounts of money has been rejected

by the courts when there is no independent verification of its content. See United States v. García, 528 F 2d 580 (5th Cir. 1976).

The testimony of Carmen Vega, the informant, should have been disregarded for it fell squarely within the aforementioned rule.

The Court of Appeals dismissed this argument by citing United States v. Maguire 600 F 2d 330 (1 Cir, 1979) refusing to recognize the validity of the holding set forth on United States v. García, creating a conflict between the two circuits.

The Government dismissed the charge against José Antonio Martínez (Tony) in Count One for lack of sufficient evidence; with whom did the appellant reach a "common design" or concocted a "community of unlawful purpose"? The Court asked the same question to the prosecutor, his answer: with himself. This is contrary to the case

law. The court erred. Reversal is mandated under U.S. v. Tarr, supra, the government failed to show the vital element that the appellant shared the criminal intent of any principal.

As to Count two the evidence presented by the government failed to establish the elements of aiding and abetting. The common criminal design was allegedly established by Reyes Peña and Pipo. There is no direct evidence and the testimony of the informant is uncorroborated as to the principal aspects dealing with the elements of the offense.

The videotapes and audio recording do not corroborate the testimony of the informant. They only served to prejudice the jury.

The government should not benefit from this "bad guy" tactic. Especially when the presence of the petitioner is more reasonably explained by the inducements of the informant--she would provide free cocaine to him--and the frequent parties

given by her at her apartment. This highly paid government informant was promoting drug and alcohol consumption with DEA money.

The petitioner had known the informant for years, visited her regularly. If he was a drug trafficker why does he only appears as a participant in this one transaction imputed by the informant?

The uncorroborated testimony of the informant is insufficient to establish the elements of the offenses charged on Counts One and Two against petitioner and they should have been dismissed.

7. WHETHER PETITIONER'S SENTENCE WAS ARBITRARY, EXCESSIVE AND DISPARATE AND CONTRAVENES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT OF THE EIGHTH AMENDMENT AND THE FIFTH AMENDMENT GUARANTEE AGAINST DOUBLE JEOPARDY.

Two defendants charged with precisely the same offense, arising out of the same

set of facts, and involving the same witnesses were tried and convicted by the Trial Court. The defendants were charged in Count 2 with aiding and abetting each other in possession with intent to distribute two ounces of cocaine. For this charge Petitioner in this case was imposed an imprisonment term of fifteen years. The other defendant was imposed a ten year term. To further aggravate the situation, the trial judge imposed petitioner's sentences in Counts 1 and 2 to run consecutively. The other defendant's sentences were imposed to run concurrently. Under these circumstances the sentences imposed to each defendant are disparate. These is no justification in the record for this disparity.

Courts have strongly condemned sentences imposed in the manner utilized by the Court in the instant case. Dorszynski v. United, 418 U.S. 424 (1974).

An important exception to the rule

against appellate interference with a sentence comes into play when a sentencing judges fails to "record an explanation... /w/hen there is substantial disparity of sentences imposed upon different individuals for engaging in the same criminal activity..." United States v. Capriola, 537 F. 2d 319, 321 (9th Cir, 1976).

It is well established that a sentencing judge must exercise his discretion and give attention to all relevant factors bearing on the offender so as to impose an individualized sentence; i.e., one that "fit/s/ the offender." United States v. Thompson, 483 F. 2d 527, 529 (3d Cir. 1973). Defendants "... /are/. . . entitled to have their sentences set primarily in terms of the seriousness of their own crimes and associated factors." United States v. Wardlaw, 576 F. 2d 939 (1st. Cir, 1978).

The trial judge erred in not making

a particularized analysis of petitioner's situation and without doing so, imposing him a harsher sentence.

This excessive sentence imposed contravenes the prohibition against cruel and unusual punishment of the Eight Amendment to the United States Constitution. Rummel v. Estelle, 587 F. 2d 651 (5th Cir, 1978), aff'd 445 US 263, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980). (excessive sentence for a trivial offense). In that case the Court also stressed its view that the Eight Amendment does proscribe some punishments that are so disproportionate as to have no rational support. Id. See also Weems v. United States, 217 US. 349 at 367, 54 L. Ed 793, 30 S. Ct. 544 (1910). In a later case, Terrebonne v. Backburh, 624 F. 2d 1363 (5th Cir. 1980), the Fifth Circuit further explained its ruling in the Rummel case.

Appellant herein respectfully submits that under three-part analysis outlined in Terrebonne his sentence must not stand.

The trial court's imposition of consecutive sentences in the case at hand also violates the Fifth Amendment guarantee against double jeopardy. In Whalen v. United States, US 63 L Ed. 2d 715, 100 S. Ct. (1980), the Supreme Court recently reiterated its principle that the Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also against multiple punishments for the same offense. 63 L Ed. 2d 715, 721. Citing North Carolina v. Pearce, 395 US at 711, 23 L Ed 2d 656, 89 S. Ct. 2072.

The Trial Court in this case expressed its belief that counts one and two could be considered as one operation or transaction. That being the case, imposing consecutive terms of imprisonment in each one of those

counts amounts to a double punishment for the same offense.

In Blockburger v. United States, 283 US 299, 76 L. Ed. 306, 52 S. Ct. 180 (1931), the Supreme Court set the rule that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. 63 L. Ed 2d at 724. In the instant case, both offenses charged arose out of the same transaction. See also Brown v. Ohio, 432 U.S. 161.

For this reason, and because of the mechanistic, disparate, excessive and, non-particularized method employed by the Court, petitioner's sentence cannot stand.

CONCLUSION

The petition for a writ of certiorari shall be granted.

Respectfully submitted.

In San Juan, Puerto Rico, on this 20th day of April, 1982.

HARRY ANDUZE MONTAÑO
P.O. Box 13323-
Santurce Station
Santurce, P. R. 00908
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this same date I mailed, through registered mail, a copy of this Petition to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Ms. Carolyn L. Gaines, Attorney, Department of Justice, Washington, D.C. 20530.

HARRY ANDUZE MONTAÑO

Appendix

United States Court of Appeals
For the First Circuit

No. 80-1481

UNITED STATES OF AMERICA,

APPELLEE,

v.

RAMON ELI BARRETO TALAVERA,

APPELLANT.

No. 80-1486

UNITED STATES OF AMERICA,

APPELLEE,

v.

TOMAS REYES PENA,

APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[HON. HERNAN G. PESQUERA, *U.S. District Judge*]

Before

COFFIN, *Chief Judge.*
CAMPBELL, *Circuit Judge.*
WYZANSKI,* *Senior District Judge.*

Scott Kalisch, for appellant Ramon Eli Barreto Talavera.
Harry Anduze Montano, for appellant Tomas Reyes Pena.
Carolyn L. Gaines, Attorney, Department of Justice, with whom *Raymond L. Acosta*, United States Attorney, was on brief, for appellee.

January 14, 1982

COFFIN, *Chief Judge.* This case raises a series of issues concerning the joint trial of two defendants for their roles in cocaine transactions in late July, 1979. After reviewing each of the defendants' arguments, we are persuaded that the convictions should be affirmed.

* Of the District of Massachusetts, sitting by designation.

The evidence at trial consisted largely of the testimony of paid informant Carmen Vega Collazo, the testimony of Drug Enforcement Administration Agent James Rivera, and a videotape and audiotape that had recorded transactions within Vega's apartment. A fair evaluation of that evidence would allow a jury to draw the following conclusions.

At about 9 p.m. on Saturday, July 28, 1979, appellant Tomas Reyes Pena made a telephone call to informant Vega. He told her he had some good cocaine and would bring her a sample if she could provide a buyer. She arranged for undercover agent Rivera to pose as a buyer. At about 11 p.m., Reyes and Jose Antonio Ortiz delivered the sample to Vega's apartment. Reyes said that he would call back on Monday to arrange for the sale of the two ounces of cocaine from which the sample was taken. On Monday he called to say that his supply had been held up and he could not make it until Tuesday.

At about 10 p.m. on Tuesday, July 31, Reyes came to Vega's apartment, accompanied by appellant Ramon Eli Barreto Talavera and Barreto's wife. Reyes showed Vega the two ounces of cocaine and weighed it on a scale that Vega had set out on her living room table. Barreto then moved the two ounces off the scale and weighed two packages of cocaine that he had removed from his shoulder bag. He spent a substantial amount of time meticulously weighing and bagging the drug. The packages weighed one-eighth kilogram (4.4 ounces). Since Agent Rivera had not yet arrived, Reyes, Barreto, and Barreto's wife left to deliver the one-eighth kilogram to someone else. After they returned, Agent Rivera arrived. He sat down at the table and weighed the two ounces of cocaine on the scale and then gave $3,200 to Vega, who in turn gave it to Reyes. Vega then went into the bedroom and brought out some heroin. She showed it to the agent, who suggested that Reyes try some. Reyes told her to show it to Barreto "because he likes it". Barreto walked over to the table and sampled the heroin by bending over and inhaling it through his nose ("snorting"). He walked away from the

table, and then returned for a second "snort". After further discussion, the meeting broke up.[1]

At trial, three counts were presented to the jury. The first count charged Reyes with aiding and abetting, possession, and distribution of the sample of cocaine on July 28,[2] in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1). The second count charged both appellants with aiding and abetting each other, possessing, and distributing the two ounces of cocaine purchased by Agent Rivera on July 31, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1). The third count charged Barreto with possessing with intent to distribute the one-eighth kilogram of cocaine on July 31, in violation of 21 U.S.C. § 841(a)(1). The jury found Reyes guilty of counts one and two, and Barreto guilty of counts two and three.

Appellants ask us to reverse the trial court for the following reasons:

1. Both appellants claim that the trial court should have severed their trials and should have suppressed all testimony and evidence regarding Barreto's sampling of the heroin.

2. Barreto claims prejudice in sentencing because the presentence report contains an allegedly unsupported assertion.

3. Reyes contends that the U.S. Attorney failed to disclose exculpatory evidence, that the evidence against him was insufficient, that he was denied effective assistance of counsel, and that he was sentenced arbitrarily and mechanistically.

We respond to these contentions in that order.

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[1] The 20-to-25 minute videotape, filmed by a camera secreted within the informant's television set, explicitly corroborated her testimony regarding almost all the events described in this paragraph. Approximately the final four minutes of the tape dealt exclusively with the heroin episode. The only activities that could not be seen on screen involved Reyes, who was seated just out of view during the last five minutes. Those activities were his actual receipt of the money from Vega and his suggestion that the heroin be given to Barreto. Both of those events were implicitly corroborated, however, by the facial expressions of the on-screen actors.

[2] In the original indictment, Ortiz was indicted along with Reyes on this count. The charges against Ortiz were dismissed before trial.

Both defendants contend that they should not have been tried together in a single proceeding. First we review whether they were properly joined as a matter of law under Fed. R. Crim. P. 8(b). Rule 8(b) permits joinder of the three different counts if we conclude that the delivery of the sample on July 28, the distribution of two ounces on July 31, and the possession of one-eighth kilogram on July 31 were part of "the same series of facts or transactions constituting an offense or offenses".[3]

This circuit has written at length concerning the standards applied in determining what constitutes a single "series of acts or transactions". *See, e.g., United States* v. *Luna*, 585 F.2d 1 (1st Cir. 1978); *United States* v. *Martinez*, 479 F.2d 824 (1st Cir. 1973); *King* v. *United States*, 355 F.2d 700 (1st Cir. 1966). A series means something more than similar acts. *King* v. *United States, supra*, 355 F.2d at 703. The reason is that Rule 8(b) strikes a compromise between each defendant's right to have his own guilt considered separately and the presumptive practical benefit to the government and the court of a consolidated proceeding. *United States* v. *Martinez, supra*, 479 F.2d at 827-28. To protect the defendant's rights,

> "this possibility of benefit should explicitly appear from the indictment or from other representations by the government before trial. Classic examples of such a benefit are when there is an overlapping of issues, . . . or when defendants are charged with conspiracy to conceal a crime that part of their number are charged with committing. . . ." *King* v. *United States*, 355 F.2d at 704.

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[3] Fed. R. Crim. P. 8(b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

We have no difficulty in concluding that the cluster of cocaine-related acts at issue in this case were a single "series of acts or transactions". The delivery of the sample on Saturday was a prelude to the delivery of the two ounces on Tuesday. Evidence of either transaction would undoubtedly have been admissible in a separate trial based on the other one, in order to prove the defendants' intent to distribute. And the evidence used to prove the delivery of two ounces on Tuesday was virtually inseparable from the evidence used to prove that Barreto possessed an additional one-eighth kilogram with intent to distribute it. The practical benefit to the court and government of a consolidated proceeding is undeniable.

Given proper joinder, we are asked to find that the trial court erred in denying severance under Fed. R. Crim. P. 14.[4] Severance motions are addressed to the sound discretion of the trial judge, and their denial will be reviewed only for abuse. *United States* v. *Smolar*, 557 F.2d 13, 21 (1st Cir. 1977). Appellants contend that the trial judge abused his discretion because they planned to present antagonistic defenses, *viz.*, Barreto planned to argue that he had nothing to do with the two ounces of cocaine, that it belonged only to Reyes, and that he was being prosecuted only because he had associated with such a bad man. It is well settled that "antagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other". *United States* v. *Davis*, 623 F.2d 188, 194 (1st Cir. 1980), *quoting United States* v. *Becker*, 585 F.2d 703, 707 (4th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). Severance is required only where the conflict is so prejudicial and the defenses are so irreconcilable that the jury will un-

[4] Fed. R. Crim. P. 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the trial court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

justifiably infer that this conflict alone demonstrates that both are guilty. *Id.* Here, Reyes did not deny that he possessed the cocaine; he only denied distributing it and having that intent. Barreto denied both possession and intent to distribute. These defenses become irreconcilable only if Barreto is allowed to make the further allegation that Reyes intended to distribute the cocaine. The trial court upheld Reyes's objections to any attempt to make such argument. Whatever minor conflicts may have existed between the defendants' approach to the case, they have not made the "strong showing of prejudice" necessary to show an abuse of discretion by the trial court. *See United States* v. *Richman*, 600 F.2d 286, 299 (1st Cir. 1979)

Next, both appellants challenge the trial court's decision to admit into evidence the testimony regarding the heroin episode, and the portions of video and audio tapes portraying that episode.[5] At trial, Barreto preserved this issue by objection to Vega's testimony about heroin. The court's denial of his motion made it clear that any similar objection to the relevant portions of the tapes would have been futile. The appellants suggest that the evidence was relevant not to any material issue, but only to showing that Barreto was a bad person who knew about using drugs. They note that the government is not permitted to use evidence of bad acts to show that someone has a bad character, from which to infer a propensity to commit the crime with which he is charged. Fed. R. Evid. 404(b).[6] *See Tigges* v. *Cataldo*, 611 F.2d 936, 938 (1st Cir. 1980). They argue further that whatever legitimate relevance the evidence may have had was substantially outweighed by its unfair prejudicial effect.

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[5] Their general contentions that the tapes as a whole were inflammatory are frivolous. *See United States* v. *Richman*, *supra*, 600 F.2d 286, 294 (1st Cir. 1979).

[6] Fed. R. Evid. 404(b) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We begin with the issue of relevance under Fed. R. Evid. 401, 402. We cannot agree that the heroin transaction had absolutely no relevance to a material issue in the case. Barreto's defense was based upon the argument that he was an innocent bystander during the distribution of the two ounces of cocaine. To convict him, the government had to show that he "associate[d] himself with the venture, that he participate[d] in it as something he wished to bring about, that he [sought] by his action to make it succeed". *United States* v. *Martinez*, 479 F.2d 824, 829 (1st Cir. 1973), *quoting United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (editorial brackets in *Martinez*). The government proved Barreto's participation in the cocaine distribution by presenting a picture of the supportive and mutually reinforcing relationship between Barreto and Reyes during the sale of the two ounces. The heroin episode immediately after the sale helped — even if only slightly — to confirm that relationship. The episode, like Barreto's removal of the two ounces from the scale, showed that he was at ease in circumstances promoting the abuse of illicit drugs. And Reyes's suggestion that the (expensive) heroin be sampled by Barreto could reasonably be interpreted as indicating that Reyes knew Barreto well and thought of him as a business associate who should be "cut in" on the various opportunities presented that evening. *Cf. United States* v. *Contreras*, 602 F.2d 1237 (5th Cir. 1979) (evidence of cocaine was immediately after heroin transaction for which defendant is prosecuted shows knowledge); *United States* v. *Lucero*, 601 F.2d 1147 (10th Cir. 1979) (in forgery prosecution, drug discussion relevant to parties' relationship and intent).

This is not the end of analysis of admissibility. Under Fed. R. Evid. 403, a further step is required, that of determining whether or not the probative value was substantially outweighed by its unfair prejudicial effect. Here, although proper objection to testimony regarding the use of heroin was made, the court made no such determination but appears

to have merely accepted the erroneous arguments of the prosecutor that anything "that happened in front of [witness Vega]" was admissible and that the heroin incident was part of the videotape.[7] Were it reasonably possible that the testimony and videotape showing of the heroin snorting unfairly influenced the verdict, we might well find reversible error in light of the low level of relevance, since the deference ordinarily given to a trial court's ruling, *United States* v. *Wright*, 573 F.2d 681, 683 (1st Cir. 1978), would not be owing. *See United States* v. *Herman*, 589 F.2d 1191, 1197-98 (3d Cir. 1978); *United States* v. *Dwyer*, 539 F.2d 924 (2d Cir. 1976). But the evidence of the defendants' guilt was overwhelming, including a videotape depicting fully the precise criminal activity charged. And the trial was conducted in a manner that would encourage the jurors to control any irrational prejudices that the "snorting" episode would have inspired. Under such circumstances, we do not believe that the admission of the evidence deprived either defendant of a substantial right. Fed. R. Crim. P. 52(a).

The appellants' remaining contentions do not require extensive treatment. Barreto objects that the Drug Enforcement Administration's presentence report contains the unsupported suggestion that he was Reyes's supplier of drugs. He therefore argues that his sentence was unconstitutional under the rule of *United States* v. *Tucker*, 404 U.S. 443 (1972). This argument is refuted by the fact that the district court explicitly disclaimed reliance on that portion of the presentence report. *See United States* v. *Masri*, 547 F.2d 932, 937 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977).

Reyes argues that the government failed to disclose exculpatory evidence. The government had received an indictment of Jose Antonio Ortiz for allegedly accompanying Reyes

[7] Obviously, not everything that happens to be caught on a single tape is automatically relevant to a given case, let alone admissible. Nor is it always impossible to play part of a tape without playing the entire thing. In this case, for example, it was certainly feasible to stop the tape before the heroin episode.

to Vega's apartment in order to deliver the sample of cocaine on July 28. The government dismissed the charge against Ortiz before trial. Subsequently, Ortiz's attorney saw the U.S. Attorney in the hall and mentioned that if the government had not dismissed the indictment, he would have sought to present an alibi defense. Reyes contends that this statement constitutes "exculpatory evidence" within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963), such that the U.S. Attorney should have disclosed it to Reyes. The U.S. Attorney had no reason to believe that Ortiz's supposed alibi was true, and he was under no duty to investigate it. Even if the U.S. Attorney had known the alibi to be true, his failure to disclose would not require reversal: the alibi, which would have served only to impeach further the credibility of a paid informant, would not have created "a reasonable doubt that did not otherwise exist". *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); *Mains* v. *Butterworth*, 619 F.2d 83 (1st Cir. 1980).[8]

Reyes argues next that the evidence against him was insufficient, suggesting that Vega's testimony should have been inadmissible because she was a paid informant. This argument is plainly frivolous. *See, e.g., United States* v. *Maguire*, 600 F.2d 330 (1st Cir.), *cert. denied*, 444 U.S. 786 (1979).

Reyes also argues that he received ineffective assistance of counsel. The Constitution requires only that the performance of a trial attorney be "within the range of competence expected from attorneys in criminal cases". *United States* v. *Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978). The performance of Reyes's attorney was safely within that range. Of the fifteen "failures" by the attorney that Reyes alleges on appeal, the vast majority are failures to object to actions by the

[8] We need not decide whether, as a general proposition, failure to disclose impeachment evidence would always constitute reversible error if it created a new reasonable doubt, or whether it might face an even stiffer standard of "probable acquittal". *See Garrison* v. *Maggio*, 540 F.2d 1271 (5th Cir.), *cert. denied*, 431 U.S. 940 (1976).

district court that we have upheld in this opinion. "Counsel is not required to waste the court's time with futile or frivolous motions". *United States* v. *Wright*, *supra*, 573 F.2d at 684. The remaining allegations pertain to (1) failure to become sufficiently familiar with the prosecution's case, (2) failure to become aware of and pursue the alibi defense that co-defendant Ortiz was planning to present, (3) failure to present an entrapment defense, and (4) the decision to concede in argument that Reyes had possession of the cocaine. The first allegation is belied by the record, which shows that counsel sought and received many documents from the government prior to trial. The second allegation falls short of a statement that counsel committed an error that "clearly resulted from neglect or ignorance", *United States* v. *Bosh*, *supra*, 584 F.2d at 1121, since Ortiz's alibi was only tangentially relevant to Reyes's defense and since Reyes's counsel had no apparent reason to know the alibi existed. The third and fourth allegations pertain to trial tactics which, in light of the evidence presented at trial, seem to have been intelligent and fully consistent with the most zealous defense possible. The decisions easily satisfy the requirement that counsel "conduc[t] the defense with reasonable knowledge and skill with an exercise of knowledgeable choices of trial tactics". *Id.* at 1122.

Finally, Reyes argues that the sentences imposed by the trial court were "arbitrary", "excessive", "disparate", "mechanistic", and showed a failure to exercise discretion. Reyes was initially sentenced to consecutive terms of 15 years each for counts I and II, with special parole terms of three years on each count to run concurrently. After he moved for reconsideration of sentence, the term of the first sentence was reduced to seven years, and the special parole term under count II was lengthened to five years. Barreto was sentenced to concurrent terms of ten years each for counts I and II, with special parole terms of three years on each count to run concurrently. When a trial judge exercises

informed discretion in imposing a sentence that lies within the prescribed statutory range and does not contravene the Eighth Amendment, and when there is no evidence that the judge considered impermissible factors, the sentence is not subject to substantive review by an appellate court. *See Dorszynski* v. *United States*, 418 U.S. 424 (1974); *United States* v. *Tucker*, *supra*, 404 U.S. at 443. Our review of the record convinces us that the trial court exercised careful and informed discretion in imposing sentences and considered no impermissible factors. The sentence was not unconstitutionally out of proportion to the severity of the crime. *See Rummel* v. *Estelle*, 445 U.S. 263 (1980) (life imprisonment permissible for recidivist who fraudulently used credit card, cashed a forged check, and obtained $120.75 by false pretenses). Reyes's contention that the consecutive sentences imposed under the two different counts violated Double Jeopardy lacks merit. Each count clearly required proof of facts that the other did not. *See Alberna* v. *United States*, 450 U.S. 333 (1981); *Blockburger* v. *United States*, 284 U.S. 299 (1931).

Finally, the trial court's decision to lengthen the special parole term as part of the resentencing did not violate Double Jeopardy. Reyes's sentence was, in effect, changed from 30 years and 3 years special parole to 22 years and 5 years special parole. Since special parole under 21 U.S.C. § 841(6) (1976) is a clear improvement over imprisonment, the new sentence is a reduction under Fed. R. Crim. P. 35. *Cf. Lam Man Chung* v. *United States*, 419 F. Supp. 1287, 1289 (S.D.N.Y. 1976) (viewing sentence and special parole term "as a package").

The convictions of the appellants are affirmed.

Adm. Office, U.S. Courts — Addison C. Getchell & Son, Inc.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 80-1486.

UNITED STATES OF AMERICA,
Appellee,

v.

TOMAS REYES PENA,
Defendant, Appellant.

JUDGMENT

Entered: January 14, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico , and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Mr. Anduze Montano and Ms. Gaines]

UNITED STATES COURT OF APPEA
FOR THE FIRST CIRCUIT APP. 13

No. 80-1486.

UNITED STATES OF AMERICA,
Appellee,

v.

TOMAS REYES PENA,
Defendant, Appellant.

Before COFFIN, Chief Judge, CAMPBELL,
BOWNES and BREYER, Circuit Judges, and
WYZANSKI,* Senior District Judge.

ORDER OF COURT

Entered February 19, 1982

Upon consideration of "Petition for Rehearing En Banc," which document was submitted to the members of the panel and to the Judges of the Court who are in regular active service, and no Judge who was a member of the panel nor any Judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the "Petition for Rehearing En Banc" is hereby denied.

By the Court:

DANA H. GALLUP, Clerk.

By Francis P. Sullivan
Chief Deputy Clerk.

*Of the District of Massachusetts, sitting by designation

(cc: Mr. Anduze Montano and Ms. Gaines.)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1486

UNITED STATES OF AMERICA,
Appellee,

v.

TOMAS REYES PENA,
Defendant, Appellant.

ORDER OF COURT

Entered: February 26, 1982

Upon motion to stay mandate and remand,

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

ANN H. GALLUP
Clerk.

[cc: Messrs. Reyes Pena, Anduze Montano, Arenas and Ms. Gaines